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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEE DIAL, Defendant and Appellant.	A103896 (Alameda County Super. Ct. Nos. 139587 & 144478)

Christopher Lee Dial appeals following a combined sentencing in two cases tried together—one (Alameda County Super. Ct. No. 144478) where he admitted prior felonies and a jury found him guilty of receiving stolen property (Pen. Code, § 496, subd. (a)[1]), and the other (Alameda County Super. Ct. No. 139587) where probation was revoked based on the same conduct. Dial claims that the court at sentencing improperly ordered him to comply with the DNA and Forensic Identification Database and Data Bank Act of 1998, as amended (the DNA Act) (§ 295 et seq.), in violation of his Fourth Amendment rights. We agree with the People that his claim is not cognizable but that the cause must be remanded for resentencing due to unauthorized and conflicting aspects of the sentence.

BACKGROUND

Case No. 139587. The probation case arose from an information charging an August 2000 robbery (§ 211)—degree unspecified—and alleging a petty-theft-with-prior (§§ 484, 666) prior for which Dial had received probation. In a negotiated disposition in October 2000, Dial pled no contest to the robbery, with promises of no prison time and

five years' probation; the prior allegation was stricken on the People's motion. As the People candidly acknowledge, the record is ambiguous about the degree of the robbery. The information did not specify the degree, but certain report and minute entries show first degree. Dial was advised that the robbery was a "serious" felony, a "violent" felony and a "strike," so that a future felony "would mean mandatory prison, double the punishment," or worse. While the three strikes law makes either a serious or violent felony a strike (§ 667, subd. (d)(1)), a "serious felony" can be either degree of robbery (§ 1192.7, subd. (c)(19)), and a "violent felony," absent firearm use, ordinarily has to be some form of first degree robbery (§ 667.5, subd. (c)(9)). Advice to Dial that his plea exposed him to prison time of "two years, three years or five years" was consistent with second degree (§ 213, subd. (a)(2)).

A stipulated factual basis for the plea was a preliminary hearing transcript showing robbery of an automated teller machine (ATM) user (potentially first degree),[2] but where the judge oddly found gun use by a cohort insufficient to support an "arming" allegation against Dial. Benjamin Singer testified that he met Dial (who looked "Mexican" due to "cholo" clothing) and a young Black man at a Greyhound station in San Francisco. They rode BART together to Berkeley to "kick back" with a friend the two said resided there. In Berkeley, Singer withdrew $300 from an ATM, in the others' presence; then they all walked to a housing complex where the friend supposedly lived. But the men left Singer when they got there and went separate ways, soon reappeared, and took Singer's cash—the $300 plus $640 he already had (unknown to them beforehand). Dial demanded money from Singer while the Black man stood behind Singer and held to his temple what felt and looked like a gun. Singer telephoned Berkeley police, identified his assailants in a show-up, and got back $932 recovered by the police.

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[1] All statutory references are to the Penal Code, unless otherwise indicated.

[2] "Every robbery of any person while using an automated teller machine or immediately after the person has used an automated teller machine and is in the vicinity of the automated teller machine is robbery of the first degree." (§ 212.5, subd. (b).)

Case No. 144478. The stolen-property case arose from a second degree robbery charge against Dial in a February 2003 information. Two prior convictions were alleged. The first, like the one dismissed in the probation case, was a petty theft with prior for which he had been granted probation—presumably a probation limiting allegation (e.g., § 1203, subd. (k) [serious or violent felony committed while on probation for a felony]) although not identified by code section. The second prior was the robbery underlying the probation case. Described here unambiguously as a first degree ATM robbery, it was also alleged to be a serious felony (§ 667, subd. (a)(1)) and a strike (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)). Dial pled not guilty and denied the priors, and the matter was set for a jury trial.

Meanwhile, the same new offense was alleged in a petition to revoke in the probation case. Probation was summarily revoked, and the two cases were set for trial together, the court granting bifurcation of the priors.

Combined trial. The second degree robbery charge was tried to a jury which found Dial not guilty of that offense, but guilty of the lesser related offense of receiving stolen property (§ 496). The offense was a New Year's Eve 2002 robbery of Josephina Arriola in Oakland's Sanborn Park by Dial and a 17-year-old cohort, Robert Davett. The main witnesses were the victim, police officers who dealt with the perpetrators and found them with the victim's property, Davett, who testified for the prosecution, and Dial, who gave a more self-exonerating account.

Arriola testified through a translator that, while walking near a bus stop at Sanborn Park, on her way to the Fruitvale BART station, two men approached and stopped right in front of her, with their clothing pulled up over their lower faces. The younger one said something to her in an unfriendly tone. She did not understand but sensed they wanted to rob her. The older one (evidently Dial) stayed there when the other spoke. Arriola first hid her purse behind her back, but then gave it to the younger man when he took out a gun and pointed it to her chest. The men ran off together into the park. Arriola telephoned the police and, while unable to identify anyone from photographs, later did get her purse and most contents from the police, including $20 cash in the same

denominations she had (5 ones, 1 five and 1 ten). An officer dispatched to the area saw two white males in front of a house, one of whom (Dial) had a black bag or purse. They took off running but were apprehended by the officer within a minute or so. Near Dial, under a tarp, were the purse and a toy gun. The purse held no cash, but Dial had $2 (2 ones) and Davett had $18 (3 ones, 1 five and 1 ten).

Davett's account differed significantly from the victim's as to the extent of Dial's involvement. Davett had already been through the juvenile court for this offense and was doing time at a youth camp. Davett said he and Dial spent the night before at the apartment of a friend, Oscar, left in the morning, and went to a small store where a younger boy let Davett have a toy gun. Davett gave it to Dial, and they walked to the house of Davett's girlfriend, Alicia, a couple of blocks from Oscar's. Davett planned to rob somebody but did not tell Dial until 20 minutes or so beforehand. Dial did not want to do a robbery but went walking with Davett through the park. When Davett stopped in the middle of the park and revealed his intentions, Dial said he was already in trouble and wanted no part of it. He gave Davett the gun back. They walked on, talking about other things, and then stopped and shared a cigarette at the bus stop. When Davett repeated his intent and focused on a woman coming toward them, Dial walked back into the park. He was at least 10 feet away when Davett robbed the woman. Then they ran to Alicia's house, where Davett "dumped out" the purse and each looked through it. Davett gave $2 of the loot to Dial, not for helping out, but just because he was "broke" and "wanted something to eat." They returned to the store. Davett, who had some other money, spent about $5, and Dial, having won money from Davett that morning by tossing quarters, bought a couple of popsicles with some change. The police caught them at Alicia's house. Davett had said pretrial that Dial "dumped" the purse, by which he meant only that Dial got rid of it afterward. Inconsistently, Davett took credit at trial for hiding the purse and gun under the tarp at the rear of the house.

Davett's account cast Dial in a less culpable light than he had in statements to the police and prosecution investigators. Davett had said the idea for the robbery was both of theirs, that they both stayed close to the woman during the crime, that Dial was reluctant

to participate but agreed to do it when offered money, that he got more than $2, that Dial got the gun and first spotted the victim, and that they spent the night before at the girlfriend's house, not Oscar's. What he told the police, Davett said, was not true. Testimony from a transport officer who knew Davett well from Camp Sweeney was that, on the way to trial, Davett was unusually quiet and, when asked what was wrong, said he was really nervous: Dial had " 'a lot of cousins . . . or friends' " in the neighborhood; Davett was worried about saying " 'the wrong thing' "; and if he did, he was " 'in big trouble' " and would " 'probably be dead' " in a week or so.

Dial's account was rambling, unfocused and shifting, despite the efforts of court and counsel to admonish him and clarify. In the end, his testimony tracked Davett's in key respects concerning the robbery itself, but pointedly contradicted him in other details. Dial said he had earned $25 babysitting the evening of December 30 and, finding himself locked out of the gate to the apartments where he and his half-sister lived, spent the night with Davett, not at Oscar's or even at Alicia's (where they did spend some time), but in the laundry room of a house where a young teen named Michael lived. They got the gun before sleeping that night and "played" with it; Davett threw it in the trash but retrieved it the next morning, when they left. They went to a store. Dial still had some of his $25, having spent $15 the night before on marijuana and some on a laundry room dryer. He bought some single cigarettes (no popsicles) and left with about $3.75, all in quarters. Dial first testified that he went to the store a second time, to buy "blunts," but later in his testimony said he bought those (to use with "weed sacks"—marijuana) the night before at "Willie Brown's"; he could not recall, or rule out, making a second store trip that next morning. Davett carried the gun as they walked to Alicia's (also "the twins' ") house. They stayed 20 minutes, outside. Sometime while walking (on the first or second store trip), Davett said he was broke and needed money, started "talking about the gun" and how "it looks real," and said "he wanted to rob somebody"—"[g]et some money." Dial advised against it, saying, "[I]t ain't worth it" and "I been through it before." Dial first testified that Davett tried to "coerce" him with an offer to "split the money"; later he

denied knowing what "coerce" meant or that Davett offered him money or anything else, or said he wanted help.

Eventually they walked to the park and bus stop. While Dial's testimony easily supports a contrary inference, he insisted that he had no idea a robbery was planned until they reached the bus stop. Davett complained again, while "walking to the park," about needing money "one way or another," but Dial, although knowing Davett was not talking about going to a bank or an ATM, heard nothing about "who he's going to rob, what he's going to rob. Anything like that." And while Dial admitted giving Davett the gun during the walk through the park, he denied that this was because he did not want to be holding it during a robbery. Dial first testified that he sat down at the bus stop to "break down a blunt," was rolling marijuana, and stood up, spilling it off his leg when Davett announced that he was going to rob a woman walking their way. Later, Dial changed his account to be that he had dealt with the blunts and marijuana the night before, and was only smoking a cigarette at the bus stop. Davett saw the victim and said, " 'I'm fixing to rob her.' " Dial saw her, too, said "I'm not doing it" or "I'm going back to the house," passed his cigarette to Davett, stood up, walked into the park and began jogging back to Alicia's. Neither he nor Davett had anything over their faces. Looking back some 10 feet beyond the park entrance, Dial saw Davett saying something to the woman. Dial did not see a gun, but Davett was soon running his way with the purse. They got to Alicia's at the same time.

At Alicia's, Davett went behind the house and dumped the purse contents out as Dial watched, telling Davett "how stupid he was." Dial said the he had dice and was going to "take that money from you anyway." When Davett "le[ft] the evidence behind," on the ground, Dial told him to put the purse under the tarp. Davett did so, after dumping the rest of its contents in a garbage can. Dial took no money directly from the purse, but then spent 10 minutes "shooting dice" with Davett, during which he got two of the $1 bills for quarters he won, realizing they were stolen. Then they went to the front of the house and "started flipping coins," and it was after this that a police officer drove up. Dial ran, knowing he had "a warrant from the 4th of July," and because running from the

police was "a natural reaction" for him, even when innocent. He went around the side of the house, not hiding, but acting like he was "taking a leak against the wall" at the side of the house. He did not hide the purse or gun. An officer who searched him found the $2 he had gotten from Davett.

Dial admitted using an alias (Daniel Omisky), giving the police in this case a false address, having prior theft convictions and being on probation for one when arrested this time. But he said he was "innocent for once." The victim, he said, had lied about him approaching her; and Davett, the officers and other witnesses had lied, too.

Jurors acquitted Dial of robbery but found him guilty of a stipulated lesser related offense of receiving stolen property (§ 496). Meanwhile, during the deliberations, Dial had been advised of his rights and admitted the two priors, specifically admitting, with a stipulated factual basis, that the October 2000 crime was a first degree ATM robbery. Thus ended trial of the substantive offense.

Probation revocation proceeded with both sides submitting on the trial evidence. The court considered the jury's rejection of robbery under a reasonable-doubt standard but, under the preponderance-of-evidence standard for a probation violation (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445-447), or even "clear and convincing evidence," found it "quite clear" that Dial had committed a robbery, as alleged. The two cases were set for joint sentencing.

Combined sentencing. At sentencing on August 11, 2003, the court announced its tentative decision to impose a midterm of four years for the underlying robbery in the probation-violation case and, oddly, to simultaneously grant five years' probation in the new case. A probation officer's report prepared for the new case had noted that Dial was ineligible for probation absent unusual circumstances (citing § 1203, subd. (e)(4) [persons with two prior felony convictions]) and, in any event, recommended against probation, noting that despite a stated willingness to comply, Dial had, among other negative factors, a record showing a pattern of regular and/or increasingly serious crimes, and prior probation performance, and numerous violations. He was on probation when he committed the latest offense and "readily admit[ted] to robbing people and selling

drugs as the primary way in which he financially supports himself." Nevertheless, the prosecutor had filed a letter recommending probation for the new case (with a prison term for the other), and this is what the court apparently relied upon.[3]

As the People note on appeal, there was some initial confusion about the proper sentence range for the robbery underlying the probation violation case. The prosecutor's letter had correctly stated the range for first degree as three, four or six years (§ 213, subd. (a)(1)(B); see fn. 3, *ante*), and this accorded with the court's tentative decision to select the midterm of four years. However, the prosecutor then orally suggested that four years might be the "low term," and this prompted the court to suggest that the range for *second* degree was "three, four, six" (when it was actually two, three or five; § 213, subd. (a)(2)). In the end, there was apparent agreement that the offense, being an ATM robbery, was first degree, and debate focused on the prosecutor's push for an upper term of six years. The court agreed with the prosecutor's listing of numerous aggravating factors but imposed the middle term, as planned. The resulting written order and abstract of judgment for the probation-violation case each reflect the four-year midterm for first degree ATM robbery. Of interest regarding Dial's appeal challenge to DNA testing, there had been no oral mention of such testing at that point, and the abstract of judgment (§ 1213.5) has a box reading "DNA pursuant to PC 296" that is *not* checked. The court orally ordered Dial "remanded for transportation to" the California Department of

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[3] Deputy District Attorney Delia Trevino wrote in part: "The People's recommendation is that the Court sentence Defendant to state prison on his probation violation petition and order a new grant of probation with credit for time served on the new case. The range of punishment available to the [C]ourt on the probation violation is 3, 4, or 6 years in state prison. In light of the [5] aggravating factors listed above and the [1] minimal factor in mitigation, the People recommend the Court sentence Defendant to 6 years in state prison on the probation violation. . . . In the new case the People recommend that Defendant be placed on probation for 5 years with the standard terms and conditions including but not limited to an order not to own, use, or possess deadly or dangerous weapons; to have no contact with victims or witnesses in this case either personally or though third parties; and to provide blood and saliva samples per Penal Code section 296. . . ."

Corrections (CDC), and the abstract similarly shows him "remanded to the custody of the sheriff," forthwith, to be delivered to the custody of the CDC at San Quentin.

On the new case ("the 496," after § 496), the court ruled to "grant five years' probation, primarily because he has been sentenced to State Prison on the probation violation. He shall be of good conduct, obey all laws. So the imposition of State Prison sentence is suspended during that period of time." After calculating credits and stating probation conditions including warrantless search and seizure, the court said: "By the way, that also reminds me. Pursuant to 296 of the Penal Code, on the probation violation sentence, you are to provide blood and saliva samples, right thumb and palm prints." Oddly, the written order for the new case, not the "probation violation" case, reflects, "Defendant is to submit to blood/saliva samples for DNA testing (Sec. 296 PC)." No objection was raised about the DNA testing.

Dial filed a timely notice of appeal on September 5, 2003, that specified only the new case. By order of December 16, 2003, this court granted Dial's motion to construe the notice of appeal as including the other case number.

DISCUSSION

I. *Issues Presented*

Dial complains that the court "ordered" him to provide DNA samples under section 296 and that taking such samples under that section violates his "rights under the Fourth Amendment to be free of unreasonable governmental intrusion." On the merits, he concedes that all three published California cases to have considered such challenges have rejected them (*People v. Adams* (2004) 115 Cal.App.4th 243, 255-259 (*Adams*); *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505-512 (*Alfaro*); *People v. King* (2000) 82 Cal.App.4th 1363, 1369-1378 (*King*) [predecessor statute, former § 290.2]), but he claims they are wrongly decided. We also note what Dial's briefing does not—that two days before he filed his reply brief, a majority in an en banc decision by the Ninth Circuit similarly rejected such a challenge to a federal DNA database statute. (*U.S. v. Kincade* (9th Cir. 2004) 379 F.3d 813, 1095, cert. den. (Mar. 21, 2005) 161 L.Ed.2d 483.) Dial

asks that the "order" requiring DNA samples "be rescinded and that any information that may have been obtained as a result of this order be both suppressed and destroyed."

The People counter the challenge on its merits, but first raise several procedural obstacles to reaching it. They urge that the claim is (1) not cognizable or remediable on this appeal, (2) premature in that the record does not show whether Dial will be or has been required to submit DNA samples, and (3) waived by failure to object below. Dial concedes his failure to object below, but maintains that the issue can be reached as a pure issue of constitutional law or as an order "beyond the court's jurisdiction."

The People, exercising their respondent's right to challenge rulings adverse to themselves (§ 1252) and the rule that "unauthorized" sentences can be remedied without a trial objection (*People v. Scott* (1994) 9 Cal.4th 331, 354), argue that the cases must be remanded for resentencing due to two "unauthorized" results: first, the court granted probation contrary to the three strikes law; second, it purported to grant that probation while sending him to prison in the other case. The need to resentence, they urge, further renders the DNA Act claim premature. Dial agrees that probation was unauthorized and that the dispositions were inconsistent but asks that, rather than remand, we "honor" the court's intentions by (1) implying a dismissal or stay of the strike prior, thus allowing probation, or (2) imposing no more than a three-year term in each case and running them concurrent with one another.

Then, himself invoking the rule that unauthorized sentences can be remedied on appeal without a trial objection, Dial raises a completely new issue in his reply brief. The robbery underlying the probation-violation case, he says, while factually perhaps first degree, as an ATM robbery, was only second degree as understood from the plea entry in October 2000. Citing the rule that a court cannot impose punishment more severe than what has been specified in a plea agreement (§ 1192.5; *People v. Walker* (1991) 54 Cal.3d 1013, 1028), he argues that the court's choice of a "midterm" here means that the only permissible term is three years (second degree), not the four years (first degree) imposed. He further claims that reconfiguring the sentence as an upper term of four years (for second degree) would be barred by *Apprendi v. New Jersey* (2000) 530 U.S. 466, and

Blakely v. Washington (2004) 542 U.S. ___ (124 S.Ct. 2531), since aggravating factors were not established by his plea. Thus, he reasons, we should not remand, but reduce the term to three years. The People have not had a chance to brief the tardily-raised claims.

II. *"Ordered" DNA Act Compliance Issues*

We are persuaded by the People's argument that Dial's DNA Act challenge cannot be reached or effectively remedied on this appeal, and this makes it unnecessary to decide either the merits of Dial's challenge or the People's other procedural arguments.

This appeal is from a criminal conviction and sentence, and Dial's challenge does not affect the judgment of conviction as it did in two of the three California cases to have considered such challenges. In each, DNA from blood samples taken under the state law produced incriminating evidence admitted at the trial. (*Adams, supra,* 115 Cal.App.4th at pp. 246-248 [motion to suppress at trial]; *King*, *supra*, 82 Cal.App.4th at pp. 1368-1369.) Nor is this case like the third case, a civil action where eight inmates sued "state officials charged with implementing the Act," seeking injunctive relief against enforcement of the law. (*Alfaro, supra*, 98 Cal.App.4th at pp. 497, 500.) This is key because Dial asks that an "order" requiring DNA samples "be rescinded *and that any information that may have been obtained as a result of this order be both suppressed and destroyed*" (italics added). The injunctive nature of the italicized relief requires proceedings in which state officials charged with the law's enforcement participate and have the opportunity to protect their interests. That is not the case on this ordinary criminal appeal.

The parties' briefing antedates substantial changes wrought by voters in the November 2, 2004 general election through the passage of Proposition 69, but the responsibility for the DNA Act's management and administration remains vested in the Department of Justice (DOJ) through its DNA Laboratory (§ 295, subd. (g)). The DOJ is responsible for implementing the act (§ 295, subd. (h)), and authority to adopt policies and enact regulations for its implementation rests with the DNA Laboratory, Department of Corrections, Board of Corrections, and Department of the Youth Authority (*id.*, subd. (h)(1)), with responsibility for collection at jails or other county facilities resting with the county sheriff or chief administrative officer of such facilities (*id.*, subd. (i)(1)).

Once samples are collected, those authorities must forward the samples to the DOJ (§ 298, subd. (a)), which enters the information (*id*., subd. (b)(6)), and sample analysis, storage and use remain the responsibility of the DOJ and its DNA Laboratory (§ 295.1, subds. (a) & (c)). Not one of those authorities or officials is a party to this action so that we or the trial court could grant injunctive relief if persuaded by Dial's Fourth Amendment claims.

Dial also seeks to have an "order" by the trial court to provide DNA samples "rescinded," which is surely something this or the trial court could do. An examination of that order in the scheme of the DNA Act, however, shows that it is more akin to an advisement and that the act's requirements that specified persons give DNA samples are, to use the People's term, "self-executing" in that they are mandatory and arise with or without a trial court advisement or order to that effect. Also, "rescinding" the order would not affect the validity of the judgment and sentence Dial appeals.

Persons specified in the DNA Act as required to give samples "shall" provide them (§ 296, subd. (a)), and the requirements of the chapter (tit. 9, ch. 6; §§ 295-300.3) "shall apply to all qualifying persons regardless of sentence imposed . . . or any other disposition rendered in the case of an adult . . . , or whether the person is diverted, fined, or referred for evaluation . . . ." (§ 296, subd. (d).) The act does state that, prior to sentencing, a court "shall inquire and verify" that required samples were obtained and that this fact is "included in the abstract of judgment"; and "the abstract of judgment issued by the court shall indicate that the court has ordered the person to comply with the requirements of this chapter and that the person shall be included in the state's DNA and Forensic Identification Data Base and Data Bank program and be subject to this chapter." (*Id.*, subd. (f).) "However, failure by the court to verify specimen, sample, and print impression collection or enter these facts in the abstract of judgment . . . shall not invalidate an arrest, plea, conviction, or disposition, or otherwise relieve a person from the requirements" of the chapter (*ibid.*), whose provisions "are mandatory and apply whether or not the court advises a person . . . that he or she must provide the data bank and database specimens, samples, and print impressions as a condition of probation,

parole, or any plea of guilty, no contest, or not guilty by reason of insanity, or any admission to any of the [qualifying] offenses" (§ 296, subd. (d); cf. *People v. McClellan* (1993) 6 Cal.4th 367, 380 [sex offender registration]).

The "order" for DNA sample compliance here appears to be in the nature of an advisement rather than a condition of probation, but the distinction is immaterial under the sections just quoted. Either way, Dial's attack on the order cannot affect the validity of his conviction and sentence or relieve him of the DNA Act's mandatory requirements. Nor can a successful Fourth Amendment challenge to the order bring him the injunctive relief he seeks. There is, accordingly, no need to reach the merits of his challenge.

III. *Unauthorized Sentence*

A. Grant of probation. We agree with the parties that the grant of probation was unauthorized and must be corrected despite lack of objection below and, indeed, despite the unauthorized grant evidently being the prosecutor's idea (fn. 3, *ante*).

The waiver doctrine usually bars the People, as well as defendants, from obtaining relief on appeal from sentencing error not first brought to the attention of the lower court. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303.) "The rule applies," for example, "to 'cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons' [citation], but the rule does not apply when the sentence is legally unauthorized [citation]." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751, citing *People v. Scott, supra,* 9 Cal.4th at pp. 353-354.) We distinguish "between unauthorized sentences—those that 'could not lawfully be imposed under any circumstances in the particular case' (*Scott,* at p. 354)—and discretionary sentencing choices—those 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.' (*Ibid.*)" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.) As to the former, appellate intervention is appropriate, despite lack of objection, because the errors present pure questions of law and are " ' " 'clear and correctable' independent of any factual issues presented by the record at sentencing." [Citation.] In other words, obvious legal

errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.' [Citation.]" (*People v. Stowell*, at p. 1113, last citing *People v. Smith* (2001) 24 Cal.4th 849, 852.)

Probation was granted in a case where Dial admitted an alleged prior strike, yet subdivision (c) of section 667 states: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions [qualifying herein as strikes], the court shall adhere to each of the following: [¶] . . . [¶] (2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense." (See also § 1170.12, subd. (a)(2).) Probation was thus *unauthorized* in the case law sense absent a *Romero* ruling striking the prior in the furtherance of justice (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; § 1385). " '[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders.' [Citation.] To achieve this end, 'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." ' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

We reject Dial's suggestion that the defect can be cured by implying a *Romero* ruling. The record contains no discussion of *Romero* or striking the prior, and such a ruling is subject to rigorous requirements, including an express statement of the court's reasons entered on the minutes (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376-377; *People v. Williams* (1998) 17 Cal.4th 148, 158-161), which is also missing here. Dial accepts our high court's guidance that an express statement in the minutes showing the exercise of section 1385 discretionary authority to dismiss or strike is needed " ' " 'so that all may know why this great power was exercised' " ' " (*People v. Williams*, at p. 159), but he insists that this is not critical here where, in his view, the *power* being

exercised is not so *great* because it entails less of a term difference than in cases where the high court has used that language. We disagree that the term length difference affects the need for reasons. Rather, "[s]triking a prior serious felony conviction ' "is an extraordinary exercise of discretion, . . . very much like setting aside a judgment of conviction after trial" ' " (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907, opn. mod. 123 Cal.App.4th 520e), and that is why express reasons are required by statute (§ 1385, subd. (a)) and the case law. We cannot cure this unauthorized sentence by implying a strike ruling. (Cf. *People v. Irvin* (1991) 230 Cal.App.3d 180, 192.)

Dial urged for the first time at oral argument that we deem the prior *stayed* rather than stricken (citing *People v. Aubrey* (1998) 65 Cal.App.4th 279, 283-285, disagreeing with *People v. Winslow* (1995) 40 Cal.App.4th 680, 689-690), but we need not reach the merits of such argument, raised without an opportunity for briefing by the People (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356-357, fn. 6). Also, whatever the merits of applying such a remedy on appeal, there is little to suggest that this would comport with the trial court's intention below, or its probable intention upon a remand for resentencing.

The need to remand for resentencing for these and other reasons (pt. III.B., *post*) allows us to merely note a second point by the People—that beyond the three strikes law prohibition, Dial was also presumptively ineligible for probation because he had incurred two prior felony convictions (§ 1203, subd. (e)(4)). The claim, which the People concede may not rise to the level of an unauthorized sentence, may be moot on remand, for the overriding finding of best interests (§ 1203, subd. (f)), will not come into play unless the court somehow avoids the effect of the prior strike.

B. Simultaneous prison commitment and probation. We next agree with the People that the court's simultaneous commitment of Dial to prison in the probation-violation case, and grant of probation in the new case, was unauthorized. Although it is self-evident, case law confirms that probation and imprisonment are inconsistent. (*People v. Marks* (1927) 83 Cal.App. 370, 376.) The dispositions "are so opposed one to the other that neither is capable of enforcement without doing extreme violence to, if not

destroying, the other" (*ibid*.), and thus necessitates a remand for resentencing (*id.* at pp. 376-377).

Dial offers an alternative to remand (or implying a stricken or stayed strike), this being to amend the judgments to show a three-year midterm in the probation-violation case (pt. III.C., *post*), a mitigated 16-month term in the new case (doubled to 32 months for the strike; see pt. III.C., *post*), and concurrent terms, so that the total effect does not exceed three years. As support for this being what the trial court intended, he argues that since the court did not specify whether the terms were consecutive or concurrent, it must have assumed that the effect, after 60 days, would be to render the terms concurrent by operation of section 669. We do not decide the effect of section 669, but do wonder why a judge would rely on section 669 rather than simply say "concurrent" or "consecutive," and wonder whether the court in this unusual case of imposing prison time and probation, rather than two prison terms, even thought about having to specify one way or the other.[4] We cannot determine what the court intended or, given Dial's history and negative report prognosis for success on probation, whether the court would have been receptive to striking or staying the prior.

The ordinary remedy for imposition of an unauthorized sentence is to affirm the conviction and remand for resentencing. (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) No different disposition is warranted here.

C. Degree of robbery and choice of term. We do not reach Dial's newly posed claims that the robbery underlying the probation-revocation case was only second degree and, if it was, the court is foreclosed from selecting an aggravated term. First, assuming purely for sake of argument that these claims are like "unauthorized" sentences that may be raised on appeal without objection below, they are improperly raised for the first time in a reply brief, with the People unfairly deprived of an opportunity to brief their response (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11). Second, we do not

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[4] Strangely, counsel for Dial does not disclose whether Dial is actually in prison or out on probation.

know whether the degree of the robbery will matter for resentencing on remand. Dial's unchallenged admission in the new case that the prior was first degree and a strike, as alleged, is dispositive even if the degree mattered to the strike status, and the court will not be able to second-guess or go behind that admission in making any *Romero* ruling it undertakes. (*People v. Wallace* (2004) 33 Cal.4th 738, 748, 750-751.) In the probation-violation case, past reliance on the degree of the robbery is now "moot," given the need to resentence (*People v. Sanchez* (1991) 230 Cal.App.3d 768, 772), and the court will be free to reconsider the entire sentencing scheme (*ibid.*) and all sentencing choices (*People v. Savala* (1983) 147 Cal.App.3d 63, 68-69). To the extent that the robbery's degree does affect the newly structured sentence, Dial will presumably raise whatever arguments he has available in this regard—this time with a chance for the People to brief their position. Third, any federal case law limitations on imposing an upper rather than a middle term are premature factually, given the range of choices, and premature legally, given that our state Supreme Court has those issues under review (*People v. Black* (S126182), argued and submitted Apr. 7, 2005; *People v. Towne* (S125677)) and will have furnished answers by the time of resentencing.

DISPOSITION

The judgments of conviction in both cases are affirmed; and the cases are remanded for resentencing.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEE DIAL, Defendant and Appellant.	A103896 (Alameda County Super. Ct. Nos. 139587 & 144478) **ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION**

THE COURT:

The opinion in the above-entitled matter filed on June 6, 2005 was not certified for publication in the Official Reports. For good cause, the request for partial publication by the Attorney General is granted.

Pursuant to California Rules of Court, rules 976 and 976.1, the opinion in the above-entitled matter is ordered certified for publication in the Official Reports, **with the exception of**: (1) the entire text of Background (pp. 1-9); (2) the last two paragraphs of part I of Discussion (pp. 10-11); and (3) the entire text of part III of Discussion (pp. 13-17).

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Kline, P.J.

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Leopoldo Dorado
Attorney for Appellant:	David D. Martin [Under the Assisted Case Assignment of the First District Appellate Project]
Attorneys for Respondent:	Bill Lockyer, Attorney General Robert R. Anderson, Chief Asst. Atty. General Gerald A. Engler, Sr. Asst. Atty. General Catherine A. Rivlin, Supervising Dep. Atty. General Mark S. Howell, Deputy Atty. General